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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 431

JOHN A. SAVAGE, *Petitioner*,

v.

IVAN K. HAPLOCK, ET AL., *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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At the outset, respondents state to the Court that the questions posed by petitioner at pages 2-3 of his brief are not based upon the record, nor upon the action of the Court of Appeals nor the District Court. The premises stated in the first question are contrary to the record, and the question is therefore fatally defective. The second and third questions, predicated as they are upon the first question, therefore do not present proper questions for consideration in this petition.

The position of petitioner is utterly devoid of merit, and his petition to this Court is interposed solely for further delay.

THE PRESENT POSTURE OF THE LITIGATION

Petitioner's brief makes reference to three different appeal numbers in the United States Court of Appeals for the District of Columbia (Nos. 12,559, 13,994 and 13,995). Respondents feel that this Court will be assisted if a brief statement is made of the source and nature of these three appeals, and of the present posture of the litigation.

Appeal No. 12,559 was taken from the final judgment of the District Court entered in Civil Action No. 111-51 on October 29, 1954 against petitioner, John A. Savage, individually and as administrator under special bond of the Estate of Myrtle deMontis, deceased. He was and is the only defendant in Civil Action No. 111-51. He noted an appeal from this judgment (Appeal No. 12,559), and this appeal was dismissed by the Court of Appeals on March 22, 1955 on his failure to perfect it. He did not petition certiorari in this Court, and the mandate of the Court of Appeals was filed in the District Court on April 25, 1955. The District Court, in turn, entered its judgment on the mandate on April 28, 1955. (Record, p. 31.)

Appeal No. 13,995 was from the final judgment entered by the District Court on February 8, 1957 in Civil Action No. 254-56 against John A. Savage (the petitioner herein) and his sister, Eliza T. Savage. This appeal was rendered completely moot by the death of Eliza T. Savage on March 16, 1958. She is completely out of the litigation for all purposes. The Court will note that the pending Petition for Writ of Certiorari is made solely by John A. Savage.

Appeal No. 13,994 is the only appellate cause now pending. It is from a supplemental judgment entered

by the District Court on February 8, 1957, solely against John A. Savage (the petitioner herein) in Civil Action No. 111-51. On June 6, 1958, the Court of Appeals affirmed the judgment of February 8, 1957, per curiam.

Procedurally, there is one further action on the part of petitioner which has significance. On October 29, 1956 (which is a date between the dismissal of his appeal in No. 12,559 by the Court of Appeals on March 22, 1955, and the entry of the supplemental judgment February 8, 1957), petitioner filed an extensive Motion to Strike and Vacate Judgment of October 29, 1954 in Civil Action No. 111-51 (Record, pp. 38-48). This was long after his present attorney, William A. Gallagher, Esq., had entered his appearance in Civil Action No. 111-51 on January 20, 1956 (Record, p. 33). The District Court overruled this motion on November 2, 1956 (Record, p. 48). Petitioner did not note an appeal from this denial.

Therefore, the posture of the litigation on the petition for certiorari is simply this: Petitioner is seeking to attack the judgment of October 29, 1954, by reaching back behind the dismissal of his appeal therefrom (Appeal No. 12,559) and behind his subsequent failure to appeal from the denial of his subsequent motion to vacate, whereas the only surviving issue is the supplemental judgment of February 8, 1957 (Appeal No. 13,994) which is primarily in aid of execution on the judgment of October 29, 1954.

THE PETITION IS WITHOUT MERIT AND SHOULD BE DENIED

Respondents believe that a forthright statement of the history of this litigation is all that is necessary to demonstrate that the petition is without merit, and should be denied.

The decedent, Myrtle deMontis, who was not related to petitioner, died on April 19, 1945. (Respondents are her sole heirs at law and next of kin.) Petitioner promptly took over her estate and accomplished his appointment as administrator under special bond by means of fraudulent representations to respondents. Thereafter, petitioner compounded his fraud in many other ways for the purpose of defrauding respondents out of their rightful shares, which he succeeded in accomplishing. (These facts are fully related in the judgment of October 29, 1954, Record, pp. 16-21.)

Petitioner's fraud was not discovered, or uncovered, by respondents until 1950. They promptly brought suit against petitioner in Civil Action No. 111-51 in January 1951, including prayers for an accounting.

On February 9, 1954 the District Court referred the cause to the Auditor of the Court (Record, p. 1). Neither side objected to the reference, "which may be treated as equivalent to consent." Eichberg v. U. S. Shipping Board, etc., 273 Fed. 886, 51 App. D. C. 44. Under an appropriate rule of the District Court, the Auditor required a deposit for the expenses of the reference to which petitioner consented, or agreed to (Record, pp. 3, 4, 4a, 4b). In any event petitioner informed the District Court that his counsel "did not object to the auditor's ruling" (Record, p. 4b, para. 4). Respondents promptly deposited their share with the Auditor. Petitioner failed to do so, and his failure was called to the attention of the District Court in the Auditor's Preliminary Report (Record, p. 1). The District Court considered the preliminary report, petitioner's sworn objections thereto, various affidavits and motions filed with respect to it, and heard argument in open court. This resulted in the Court's

order of July 28, 1954 which struck petitioner's answer and all pleadings and entered judgment against him, unless he within five days made a deposit with the Auditor. (Record, p. 4e.)

Petitioner failed to make the deposit, although clearly able to do so. On the fifth day he handed to the Auditor's office a check in the required amount, but accompanied it with the condition that he would sue both the District Judge and the Auditor in the Municipal Court "for recovery of the extorted money, plus punative (sic) damages" unless the money was returned to him within fifteen days (Record, p. 4f). The question of whether he had complied was placed squarely before the District Court by respondents' motion of September 15, 1954 (Record, pp. 4d, 4e, 4f, 4g) which was opposed by petitioner both in writing and by argument in open court, following which the District Court set the cause down for ex parte proof before a nonjury court and for such other and further proceedings as the nature of the case might require (Record, p. 5).

The hearing was held on October 22, 1954 before District Judge Keech. The hearing took up the entire day. Respondent Ivan K. Hadlock testified in extenso, followed by two other witnesses. Respondent Carmita L. Helmbold was not able to be present since she was a helpless paralytic, confined to her home in California. Respondents introduced fifty-one (51) exhibits to prove their case, the bulk of which were letters written by petitioner, himself. The transcript of the hearing is 163 pages long. This transcript has been physically filed in this Court. The excerpts therefrom which petitioner has printed at the outset of his "appendix" at the back of his brief are taken from

context and are misleading. Neither this transcript, nor the excerpts, were contained in the printed record in the Court of Appeals. Petitioner seeks to justify his inclusion of the excerpts in his appendix by Rule 23(f) of this Court, which, to the contrary, does *not* authorize any such inclusion, since the record was printed in the Court of Appeals, and petitioner has filed nine copies of this record in this Court.

The learned District Judge (Richmond B. Keech) carefully and conscientiously considered the evidence and the record, before signing his extensive findings, conclusions and judgment of October 29, 1954 (Record, pp. 16-21). He only did so after considering "Defendant's Objections to Proposed Order of Judgment for Plaintiffs" (Record, pp. 5-16). At the outset of his judgment, the District Judge stated that he had considered "the pleadings herein, the evidence offered by the plaintiffs, the evidence offered by the defendant, and after full hearing of plaintiffs and of defendant, and the defendant having had full and ample opportunity and notice to bring such witnesses as he may have desired to call and to adduce such evidence as the defendant may have desired to adduce" (Record, pp. 16-17). It is grossly and manifestly unfair to this District Judge for petitioner in phrasing his questions to this Court to say that he was denied "the right to testify, to produce witnesses, and to produce documentary evidence in support of the defenses set out in his answer." (Petitioner's Brief, page 2, question 1.) The record shows that, to the contrary, he was given a full hearing, fully satisfying due process of law. The District Judge stated unequivocally (page 155 of the transcript; page 8a of Appendix to Petitioner's Brief): "You came down here insisting on being

heard and you have been accorded a hearing which frankly I am not sure that you are entitled to but you have had it anyway."

The further proceedings which culminated in the supplemental judgment of February 8, 1957 (Record, pp. 56-63) were made necessary only because of petitioner's further fraud on the Court and on respondents. At the end of the day on Friday, October 22, 1954, District Judge Keech had announced from the bench that he would enter judgment in favor of respondents and against petitioner, and he directed that findings, conclusions and judgment be drafted and submitted to him. Petitioner, and his now deceased sister, Eliza T. Savage, heard this. On the next succeeding business day, Monday, October 25, 1954, at nine o'clock in the morning, she put on record fraudulent deeds to several pieces of real property, in which she was the fraudulent grantee. (These facts are contained in the supplemental judgment, Record, pp. 56-63.)

The Order of July 28, 1954 Is Valid in Every Sense

Petitioner relies on the doctrine of Hovey v. Elliott, 167 U. S. 409, 17 S. Ct. 841 (1897). Respondents say that this doctrine has no application because the facts in Hovey v. Elliott were entirely different. Rather the applicable law is found in National Union of Marine Cooks & Stewards v. Arnold, 348 U. S. 37, 75 S. Ct. 92 (1954) which discusses and distinguishes Hovey v. Elliott, and in Societe Internationale, etc., v. Brownell, 96 U. S. App. D. C. 232, 225 F. 2d 532 (1955), cert. den. 350 U. S. 937, 76 S. Ct. 302, rehrg. den. 350 U. S. 976, 76 S. Ct. 430, wherein the U. S. Court of Appeals for the District of Columbia Circuit recognized that "a court has inherent power to dis-

miss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has failed to comply with order of the court issued pursuant to its rules." This Court's statement in the National Union case makes this rule equally applicable to a party defendant.

In Hovey v. Elliott the trial court entered an order requiring the defendants to "pay over to the registry of the court" the sum of $49,297.50, which had been paid them by the receiver, Riggs & Co., a District of Columbia bank, representing the full market value of bonds sold by the receiver to the defendants. When the defendants failed to pay the money into the registry of the court, a series of proceedings ensued which were in name and nature contempt proceedings. These culminated in the court's striking their answer and entering a decree pro confesso against them, *without hearing*. This Court rendered an extensive discourse on the law of contempt from the earliest days, and struck down the trial court's decree as depriving the defendants of their property "without any hearing whatever;" and therefore without due process of law, as a punishment for contempt.

In the pending litigation, contempt is not involved, nor was it involved in the District Court. The only issue there was the inherent power of the trial court to enforce its rules. This Court has had occasion, many times since Hovey v. Elliott (1897), to consider the narrow limitations of the doctrine there announced, and has sanctioned and authorized the course taken by the District Court. Rules 37 (b) (2) (iii) and 37 (d), F. R. Civ. P., are excellent examples. The note of the Advisory Committee following Rule 37 states that the cited provisions of Rule 37 "are in accord with

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 57 L. Ed. 530, 15 Ann. Cas. 645 (1909) which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in Hovey v. Elliott, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897), for the mere purpose of punishing for contempt."

But this Court has gone further, saying in the National Union case, supra, in footnote 5, as follows:

> 5. The deprivation of a litigant's right to present a defense has been upheld, not as punishment for contempt as prohibited in Hovey v. Elliott, supra, but rather as a result of the litigant's failure to produce evidence, *his violation of a rule of procedure*, or other action justifying a judgment of default against him. (Citing cases). (Emphasis supplied.)

The following year (1955) the Court of Appeals for the District of Columbia Circuit did not hesitate to apply the philosophy of the National Union case, saying in Societe Internationale, supra, as follows:

> We agree with Chief Judge Laws that the power to dismiss is not dependent upon the terms of Rule 37; that is to say, we think it unnecessary to find a refusal within the meaning of that Rule. As he said:
>
> "* * * apart from dismissal by authority of specific rule of court or statute, a court has inherent power to dismiss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has *failed to comply with order of the court issued pursuant to its rules.* * * * If this were not so, a court would be powerless to enforce its rules and a liti-

gant might ignore them with abandon. * * *" (111 F. Supp. at page 447.) (Emphasis supplied.)

This Court, as noted above, denied certiorari and rehearing in this cited case, leaving standing intact the decision of the Court of Appeals. While the offending litigant in this cited case was a party plaintiff, the same judicial philosophy unquestionably is applicable to a party defendant under the holding of this Court in the National Union case a year earlier.

In the case at bar, the Auditor of the District Court after hearing issued an order pursuant to Local Rule 15. His order was consented to, or at the very least acquiesced in, by petitioner. The District Court in its order of July 28, 1954 confirmed the Auditor's order, and provided a means of enforcing it; otherwise the court would have been powerless to enforce its rules and petitioner could ignore them with abandon. Petitioner was not without lawful remedy; he could have applied to the Court of Appeals for leave to file a petition for writ of mandamus, or he could have brought this question before the Court of Appeals by appeal in the regular manner. He did neither. (He noted an appeal, but it was dismissed when he failed to perfect it.)

What petitioner did instead was to threaten the District Court as a condition to purported compliance with the Court's order. Was the District Court powerless to enforce its rules and petitioner entitled to ignore them with abandon? Particularly in light of his consent to the reference to the Auditor (by failure to object), and in light of his acquiescence in the Auditor's order as he himself admitted under oath (Record, p. 4b, para. 4)? The District Court did no more than

enforce its order entered pursuant to its rules, and the order of July 28, 1954 was valid in every respect.

The Judgment of October 29, 1954 Is Valid in Every Respect

District Judge Keech's judgment of October 29, 1954 was based on a full hearing accorded to petitioner. He had due and ample notice of the hearing, was present throughout, and had every opportunity to offer evidence which he did.

Here again the complete inapplicability of Hovey v. Elliott is apparent. In that case there was no hearing of any kind whatever; in the case at bar petitioner had ample notice of the hearing and participated fully therein. District Judge Keech acted in the fullest sense as a chancellor in the exercise of his equity powers. He was fully and extensively advised, as his judgment of October 29, 1954 demonstrates (Record, pp. 16-21). There is no question whatever that petitioner fully understood the nature and extent of the hearing as his lengthy objections to Judge Keech's proposed judgment show (Record, pp. 5-16). He moved for a new trial and argued the motion which was denied by District Judge Keech on November 16, 1954 (Record, p. 22). In due course he noted a timely appeal (No. 12,559) from the judgment; this appeal was dismissed in March 1955 since he failed to perfect it.

Petitioner Has No Standing to Contest Order of July 28, 1954 and Judgment of October 29, 1954 in This Proceeding

Petitioner has no standing to contest the validity of the order and the judgment in this proceeding.

After the District Court entered its order of April 28, 1955 on the mandate of the Court of Appeals dated

April 25, 1955 (Record, p. 31), the U. S. Marshal executed a writ of assistance issued by the District Court and in so doing placed in the possession of respondents two houses which were promptly sold by respondents to purchasers for value (Record, pp. 25-28). Respondent Carmita L. Helmbold had died in the interim between the judgment of October 29, 1954 and the dismissal of petitioner's appeal in No. 12,559 in March 1955, having passed away on December 2, 1954 (Record, p. 50). Many months later, on January 20, 1956, respondents filed a new action, Civil Action No. 254-56, asking the court to vacate and set aside as fraudulent to them deeds to three other houses, resulting in the judgment of February 8, 1957, and Appeal No. 13,995 which is moot by virtue of the death on March 16, 1958 of petitioner's sister, Eliza T. Savage, who was petitioner's fraudulent joint grantee.

On October 29, 1956, petitioner sought to strike and vacate the judgment of October 29, 1954, filing a lengthy motion for this purpose (Record, pp. 38-48). This was considered and overruled by District Judge Keech on November 2, 1956 (Record, p. 48). Petitioner failed to appeal from this order. The final hearing held by District Judge Rizley did not take place until January 23, 1957 (Record, p. 56) which was long after the time for petitioner to note an appeal from District Judge Keech's order of November 2, 1956 had expired. When District Judge Rizley, then, heard the several motions of respondents (Record, pp. 48-50, 51-55) in Civil Action No. 111-51 to enforce the judgment of October 29, 1954, petitioner had foreclosed himself from any further attack on the order of July 28, 1954 and the judgment of October 29, 1954—he had had the matter before the Court of Ap-

peals on his appeal in No. 12,559 which was dismissed in March 1955, and the following year before District Judge Keech on November 2, 1956. It is no wonder that District Judge Rizley in his decree of February 8, 1957 was moved to say:

> The Court further finds that the said defendant John A. Savage had his day in Court so to speak in said Civil Action No. 111-51 and that his purported claims of unfair treatment by the Court who heard the determined said Cause No. 111-51 are without merit and substance and that the judgment so rendered by the Court on October 29, 1954, in said Cause No. 111-51 was and has been at all subsequent times valid and binding. (Record, p. 61 at 275.)

In so saying, District Judge Rizley was repeating what the record showed to be very clear.

Prior to the adoption of the Federal Rules of Civil procedure on September 16, 1938, a litigant could attack the validity of a subsisting judgment by a bill of review, and of course the new Rules contain a similar type of remedy in Rule 60 (b). But under neither the old practice could, nor under the new Rule 60 (b) can, a litigant repeatedly challenge a judgment and not pursue his challenge to ultimate disposition. This was stated forcefully by this Court in Ackermann v. United States, 340 U. S. 193, 71 S. Ct. 209 (1950), as follows:

> There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Petitioner had made two separate and distinct challenges to the order of July 28, 1954 and the judgment of October 29, 1954 long prior to District Judge Riz-

ley's hearing on January 23, 1957. His challenges so made were "free, calculated, deliberate choices."

The Court of Appeals for the District of Columbia Circuit had earlier in 1942 expressed the same view in Fraser v. Doing, 76 U. S. App. D. C. 111, 130 F. 2d 617, saying emphatically:

> There is no more reason now than in earlier years to encourage litigants, by its (Rule 56(e)) use, to "drag out litigation endlessly, or to furnish a field for the unnecessary expenditure of money in costs and solicitors' fees."

In considering a bill of review filed by a litigant, the Court said further:

> So far as the record reveals—and it is a record made by appellant for his own purposes—he failed to avail himself of his opportunity to challenge the jurisdiction of trial court either in that court, or on appeal to this court.

And the same Court in the footnote (no. 21) to this statement quoted language from Rothschild & Co. v. Marshall, 51 F. 2d 897, C. A. 9, 1931, which more fully from the Rothschild case is as follows:

> To relieve against a judgment on the ground of accident or mistake, if it appears at all in a case like the one before us, it must be shown that the complaining party was without fault or negligence. A court is without power to grant relief if it appears that the party alleged to have been aggrieved could have, with proper diligence, prevented the mistake complained of. "Laches, as well as positive fault, is a bar to such relief." Brown v. County of Buena Vista, 95 U. S. 157, 159, 24 L. Ed. 422.

In the case at bar, if any mistake had been committed by the District Court in its order of July 28, 1954 or in its judgment of October 29, 1954, petitioner had every opportunity to prevent a continuation of such a mistake by perfecting his appeal in No. 12,559, or later by appealing from District Judge Keech's order of November 2, 1956. But there was no mistake in either the order or the judgment, and if there were, the laches of petitioner estops him from contesting either one in this proceeding.

A motion under Rule 60 (b) for relief from a judgment must be filed within a reasonable time. A reasonable time is necessarily a very short and limited period of time in circumstances such as those in this case, because, at every stage of the proceedings, petitioner was fully advised. He chose not to perfect his appeal in No. 12,559, and he chose not to appeal from District Judge Keech's order of November 2, 1956. Now he contends that he has standing in this proceeding to challenge the judgment of October 29, 1954 from which he had his right of appeal which he abandoned. In other words, he says he has a right to revive his appeal in No. 12,559 by substituting the order of District Judge Rizley dated February 8, 1957 for District Judge Keech's judgment of October 29, 1954, knowing that by his continued fraudulent conduct he forced respondents to obtain District Judge Rizley's order of February 8, 1957 in order to be fully made whole. He is estopped by his own conduct from so contending.

The Court of Appeals for the District of Columbia Circuit considered the concept of a "reasonable time" and Rule 60 (b) in Gilmore v. Hinman, 89 U. S. App. D. C. 165, 191 F. 2d 675 (1951). Appellant in that

case had noted but failed to perfect an appeal, which was accordingly dismissed. The following year (1950) appellant filed a motion to revoke the reference to the Auditor and set aside the judgment. The motion was denied, and appellant appealed on the ground that the trial court lacked authority to make the reference to the Auditor. The Court of Appeals affirmed per curiam, holding that sixteen months was not a reasonable time and that a motion of this sort cannot be used as a substitute for an appeal. And in the case at bar, Appeal No. 13,994, the time involved is over twenty-seven months (between District Judge Keech's judgment of October 29, 1954, and District Judge Rizley's order of February 8, 1957).

The Fifth Circuit Court of Appeals, in a case somewhat analogous to the case at bar, rejected the appellant's contentions under Rule 60 (b), holding that time is the essence of a motion for relief under this rule, Cromelin v. Markwalter, 181 F. 2d 948, 14 Fed. Rules Serv. 60b.35, (1950). Appellant in June 1949 had petitioned the court to rescind all prior proceedings and orders made in the cause since September 1947 when he himself had initiated the bankruptcy proceeding. The court said:

> In the first place, they were not made in a reasonable time, and this is of the essence of a motion for relief under rule 60 (b) on the ground claimed in the petitions that the orders were void. The petitions were not filed until more than a year after the sales had been made, the money paid, and the property delivered, though all of the proceedings now complained of had been taken with the full knowledge of appellant and, as to some of them, an appeal had been perfected and then abandoned.

Petitioner has had the fullest consideration not only by the District Court, but as well by the Court of Appeals, throughout the seven years that Civil Action No. 111-51 has been dragging in litigation, at all times and at every step with his full knowledge.

Limitation of the Questions on Appeal in Forma Pauperis Made by the Court Below Was Entirely Proper

In the petition (pages 5-7), petitioner challenges the action of the Court Below in limiting the issues to be heard on appeal granted to petitioner in forma pauperis by framing two questions. The wisdom of the Court's action in this regard is full demonstrated by petitioner's attempt in this Court to go back to the judgment of October 29, 1954 from which he failed to perfect his appeal in No. 12,559, by substituting therefor his appeal in No. 13,994 from the order of February 8, 1957. This tactic in the Court Below would have saddled the public with unnecessary costs, as so aptly pointed out by this Court in Adkins v. E. I. DuPont De Nemours & Co., 335 U. S. 331, 69 S. Ct. 85 (1948), as follows:

> *First.* We do not think the court was without power to protect the public from having to pay heavy costs incident to the inclusion of "wholly unnecessary" matters in an *in forma pauperis* appeal. * * *
>
> We know of few more appropriate occasions for use of a court's discretion than one in which a litigant, asking that the public pay costs of his litigation, either carelessly or wilfully and stubbornly endeavors to saddle the public with wholly uncalled-for expense. So here, the court was not required to grant the petitioner's motion if she wrongfully persisted in including in the appeal

record masses of matter plainly irrelevant to the issues raised on appeal. * * *

The Court Below very properly and very effectively handled the matter by restricting the appeal in forma pauperis to those issues which should have been considered, thus eliminating the possibility of petitioner's saddling the public with unjustified costs.

CONCLUSION

The petition is utterly devoid of merit. There is no substantial question involved. The only question actually left in the litigation is the question of the appointment by the District Court of a trustee to judicially sell real property in partial satisfaction of a final judgment. Petitioner commenced perpetrating fraud, promptly on the death of the decedent on April 19, 1945, more than thirteen years ago. Petitioner has dragged out this litigation for seven years. It is time that it was brought to an end.

Respondents respectfully pray this Court to deny the petition for certiorari.

Respectfully submitted,

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